

FIRST REGULAR SESSION

# SENATE BILL NO. 36

98TH GENERAL ASSEMBLY

INTRODUCED BY SENATORS ROMINE AND SCHATZ.

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ADRIANE D. CROUSE, Secretary.

0355S.02I

## AN ACT

To repeal sections 213.010, 213.070, 213.101, 213.111, and 287.780, RSMo, and to enact in lieu thereof six new sections relating to unlawful discriminatory practices.

*Be it enacted by the General Assembly of the State of Missouri, as follows:*

Section A. Sections 213.010, 213.070, 213.101, 213.111, and 287.780, RSMo, are repealed and six new sections enacted in lieu thereof, to be known as sections 213.010, 213.070, 213.101, 213.111, 285.575, and 287.780, to read as follows:

213.010. As used in this chapter, the following terms shall mean:

(1) "Age", an age of forty or more years but less than seventy years, except that it shall not be an unlawful employment practice for an employer to require the compulsory retirement of any person who has attained the age of sixty-five and who, for the two-year period immediately before retirement, is employed in a bona fide executive or high policy-making position, if such person is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit sharing, savings or deferred compensation plan, or any combination of such plans, of the employer, which equals, in the aggregate, at least forty-four thousand dollars;

(2) **"Because" or "because of", as it relates to a decision or action, the protected criterion was a motivating factor;**

(3) "Commission", the Missouri commission on human rights;

~~(3)~~ (4) "Complainant", a person who has filed a complaint with the commission alleging that another person has engaged in a prohibited discriminatory practice;

**EXPLANATION—Matter enclosed in bold-faced brackets [thus] in this bill is not enacted and is intended to be omitted in the law.**

17            [(4)] (5) "Disability", a physical or mental impairment which  
18 substantially limits one or more of a person's major life activities, being regarded  
19 as having such an impairment, or a record of having such an impairment, which  
20 with or without reasonable accommodation does not interfere with performing the  
21 job, utilizing the place of public accommodation, or occupying the dwelling in  
22 question. For purposes of this chapter, the term "disability" does not include  
23 current, illegal use of or addiction to a controlled substance as such term is  
24 defined by section 195.010; however, a person may be considered to have a  
25 disability if that person:

26            (a) Has successfully completed a supervised drug rehabilitation program  
27 and is no longer engaging in the illegal use of, and is not currently addicted to,  
28 a controlled substance or has otherwise been rehabilitated successfully and is no  
29 longer engaging in such use and is not currently addicted;

30            (b) Is participating in a supervised rehabilitation program and is no  
31 longer engaging in illegal use of controlled substances; or

32            (c) Is erroneously regarded as currently illegally using, or being addicted  
33 to, a controlled substance;

34            [(5)] (6) "Discrimination", any unfair treatment based on race, color,  
35 religion, national origin, ancestry, sex, age as it relates to employment, disability,  
36 or familial status as it relates to housing;

37            [(6)] (7) "Dwelling", any building, structure or portion thereof which is  
38 occupied as, or designed or intended for occupancy as, a residence by one or more  
39 families, and any vacant land which is offered for sale or lease for the  
40 construction or location thereon of any such building, structure or portion thereof;

41            [(7)] (8) "Employer" [includes], **a person engaged in an industry**  
42 **affecting commerce who has six or more employees for each working**  
43 **day in each of twenty or more calendar weeks in the current or**  
44 **preceding calendar year, and shall include** the state, or any political or civil  
45 subdivision thereof[, or any person employing six or more persons within the  
46 state, and any person directly acting in the interest of an employer, but does not  
47 include corporations and associations owned and operated by religious or  
48 sectarian groups]. **"Employer" shall not include the United States, a**  
49 **corporation wholly owned by the government of the United States, an**  
50 **individual employed by an employer, an Indian tribe, or any**  
51 **department or agency of the District of Columbia subject by statute to**  
52 **procedures of the competitive service, as defined in 5 U.S.C. Section**

53 **2101, or a bona fide private membership club (other than a labor**  
54 **organization) which is exempt from taxation under 26 U.S.C. Section**  
55 **501(c), and shall not include corporations and associations owned and**  
56 **operated by religious or sectarian groups;**

57 [(8)] (9) "Employment agency" includes any person or agency, public or  
58 private, regularly undertaking with or without compensation to procure  
59 employees for an employer or to procure for employees opportunities to work for  
60 an employer and includes any person acting in the interest of such a person;

61 [(9)] (10) "Executive director", the executive director of the Missouri  
62 commission on human rights;

63 [(10)] (11) "Familial status", one or more individuals who have not  
64 attained the age of eighteen years being domiciled with:

65 (a) A parent or another person having legal custody of such individual; or

66 (b) The designee of such parent or other person having such custody, with  
67 the written permission of such parent or other person. The protections afforded  
68 against discrimination on the basis of familial status shall apply to any person  
69 who is pregnant or is in the process of securing legal custody of any individual  
70 who has not attained the age of eighteen years;

71 [(11)] (12) "Human rights fund", a fund established to receive civil  
72 penalties as required by federal regulations and as set forth by subdivision (2) of  
73 subsection 11 of section 213.075, and which will be disbursed to offset additional  
74 expenses related to compliance with the Department of Housing and Urban  
75 Development regulations;

76 [(12)] (13) "Labor organization" includes any organization which exists  
77 for the purpose, in whole or in part, of collective bargaining or of dealing with  
78 employers concerning grievances, terms or conditions of employment, or for other  
79 mutual aid or protection in relation to employment;

80 [(13)] (14) "Local commissions", any commission or agency established  
81 prior to August 13, 1986, by an ordinance or order adopted by the governing body  
82 of any city, constitutional charter city, town, village, or county;

83 [(14)] (15) "Person" includes one or more individuals, corporations,  
84 partnerships, associations, organizations, labor organizations, legal  
85 representatives, mutual companies, joint stock companies, trusts, trustees,  
86 trustees in bankruptcy, receivers, fiduciaries, or other organized groups of  
87 persons;

88 [(15)] (16) "Places of public accommodation", all places or businesses

89 offering or holding out to the general public, goods, services, privileges, facilities,  
90 advantages or accommodations for the peace, comfort, health, welfare and safety  
91 of the general public or such public places providing food, shelter, recreation and  
92 amusement, including, but not limited to:

93 (a) Any inn, hotel, motel, or other establishment which provides lodging  
94 to transient guests, other than an establishment located within a building which  
95 contains not more than five rooms for rent or hire and which is actually occupied  
96 by the proprietor of such establishment as his residence;

97 (b) Any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or  
98 other facility principally engaged in selling food for consumption on the premises,  
99 including, but not limited to, any such facility located on the premises of any  
100 retail establishment;

101 (c) Any gasoline station, including all facilities located on the premises of  
102 such gasoline station and made available to the patrons thereof;

103 (d) Any motion picture house, theater, concert hall, sports arena, stadium,  
104 or other place of exhibition or entertainment;

105 (e) Any public facility owned, operated, or managed by or on behalf of this  
106 state or any agency or subdivision thereof, or any public corporation; and any  
107 such facility supported in whole or in part by public funds;

108 (f) Any establishment which is physically located within the premises of  
109 any establishment otherwise covered by this section or within the premises of  
110 which is physically located any such covered establishment, and which holds itself  
111 out as serving patrons of such covered establishment;

112 [(16)] (17) "Rent" includes to lease, to sublease, to let and otherwise to  
113 grant for consideration the right to occupy premises not owned by the occupant;

114 [(17)] (18) "Respondent", a person who is alleged to have engaged in a  
115 prohibited discriminatory practice in a complaint filed with the commission;

116 [(18)] (19) "Unlawful discriminatory practice", any act that is unlawful  
117 under this chapter.

213.070. 1. It shall be an unlawful discriminatory practice:

2 (1) To aid, abet, incite, compel, or coerce the commission of acts prohibited  
3 under this chapter or to attempt to do so;

4 (2) To retaliate or discriminate in any manner against any other person  
5 because such person has opposed any practice prohibited by this chapter or  
6 because such person has filed a complaint, testified, assisted, or participated in  
7 any manner in any investigation, proceeding or hearing conducted pursuant to

8 this chapter;

9 (3) For the state or any political subdivision of this state to discriminate  
10 on the basis of race, color, religion, national origin, sex, ancestry, age, as it  
11 relates to employment, disability, or familial status as it relates to housing; or

12 (4) To discriminate in any manner against any other person because of  
13 such person's association with any person protected by this chapter.

14 **2. This chapter, in addition to chapter 285 and chapter 287, shall**  
15 **provide the exclusive remedy for any and all unlawful employment**  
16 **practices articulated herein and hereby abrogates any common law**  
17 **causes of action not specifically articulated herein.**

213.101. 1. The provisions of this chapter shall be construed to  
2 accomplish the purposes thereof and any law inconsistent with any provision of  
3 this chapter shall not apply. Nothing contained in this chapter shall be deemed  
4 to repeal any of the provisions of any law of this state relating to the  
5 discrimination because of race, color, religion, national origin, sex, ancestry, age,  
6 disability, or familial status.

7 **2. In interpreting and applying chapter 213 in employment cases,**  
8 **courts shall rely heavily upon judicial interpretations of Title VII of the**  
9 **Civil Rights Act of 1964 (42 U.S.C. 2000e et. seq.) as amended, the Age**  
10 **Discrimination in Employment Act of 1967 (29 U.S.C. 621 et. seq.), and**  
11 **the Americans with Disabilities Act (42 U.S.C. 12101 et seq.), as**  
12 **amended.**

13 **3. The general assembly intends expressly to abrogate by this**  
14 **statute the case of McBryde v. Ritenour School District, 207 S.W.3d 162**  
15 **(Mo. App. E.D. 2006), and its progeny as it relates to the necessity and**  
16 **appropriateness of the issuance of a business judgment instruction.**

17 **4. Rule 74.04, Missouri rules of civil procedure, is an integral**  
18 **part of the rules as a whole and can be a tool of great utility in**  
19 **removing factually insubstantial cases under this chapter from crowded**  
20 **dockets. If an employer in a case under this chapter files a rule 74.04**  
21 **motion, there are two frameworks for analysis that should be**  
22 **considered highly persuasive:**

23 **(1) Plaintiff may submit direct evidence of discrimination, in**  
24 **which case the analysis of Price Waterhouse v. Hopkins, 490 U.S. 228,**  
25 **258 (1989) and its progeny, are highly persuasive;**

26 **(2) If plaintiff submits no direct evidence of discrimination, then**  
27 **the burden shifting analysis of McDonnell Douglas Corp. v. Green, 411**

28 U.S. 792, 800-01 (1973) and its progeny present a highly persuasive  
29 framework for analysis.

30 5. The general assembly intends expressly to abrogate by this  
31 statute the cases of *Daugherty v. City of Maryland Heights*, 231 S.W.3d  
32 814(Mo. banc 2007), *Korando v. Mallinckrodt, Inc.*, 239 S.W.3d 647 (Mo.  
33 App. E.D. 2007), *Lomax v. Daimler Chrysler Corp.*, 243 S.W.3d 474 (Mo.  
34 App. E.D. 2008), and *Francin v. Mosby, Inc.*, 248 S.W.3d 619 (Mo. App.  
35 E.D.) and their progeny, as they relate to the contributing factor  
36 standard and abandonment of the burden shifting framework  
37 established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-01  
38 (1973) and the mixed motive framework established in *Price*  
39 *Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). The general assembly  
40 also intends to abrogate MAI 31.24, MAI 31.25, MAI 31.27.

213.111. 1. If, after one hundred eighty days from the filing of a  
2 complaint alleging an unlawful discriminatory practice pursuant to section  
3 213.055, 213.065 or 213.070 to the extent that the alleged violation of section  
4 213.070 relates to or involves a violation of section 213.055 or 213.065, or  
5 subdivision (3) of section 213.070 as it relates to employment and public  
6 accommodations, the commission has not completed its administrative processing  
7 and the person aggrieved so requests in writing, the commission shall issue to the  
8 person claiming to be aggrieved a letter indicating his or her right to bring a civil  
9 action within ninety days of such notice against the respondent named in the  
10 complaint. If, after the filing of a complaint pursuant to sections 213.040,  
11 213.045, 213.050 and 213.070, to the extent that the alleged violation of section  
12 213.070 relates to or involves a violation of sections 213.040, 213.045 and  
13 213.050, or subdivision (3) of section 213.070 as it relates to housing, and the  
14 person aggrieved so requests in writing, the commission shall issue to the person  
15 claiming to be aggrieved a letter indicating his or her right to bring a civil action  
16 within ninety days of such notice against the respondent named in the  
17 complaint. Such an action may be brought in any circuit court in any county in  
18 which the unlawful discriminatory practice is alleged to have [occurred] **been**  
19 **committed**, either before a circuit or associate circuit judge. Upon issuance of  
20 this notice, the commission shall terminate all proceedings relating to the  
21 complaint. No person may file or reinstate a complaint with the commission after  
22 the issuance of a notice under this section relating to the same practice or  
23 act. Any action brought in court under this section shall be filed within ninety

24 days from the date of the commission's notification letter to the individual but no  
25 later than two years after the alleged cause occurred or its reasonable discovery  
26 by the alleged injured party.

27         2. The court may grant as relief, as it deems appropriate, any permanent  
28 or temporary injunction, temporary restraining order, or other order, and may  
29 award to the plaintiff actual and punitive damages, and may award court costs  
30 and reasonable attorney fees to the prevailing party, other than a state agency  
31 or commission or a local commission; except that, a prevailing respondent may be  
32 awarded court costs and reasonable attorney fees only upon a showing that the  
33 case is without foundation.

34         **3. Any party to any action initiated under this section may**  
35 **demand a trial by jury.**

36         **4. The sum of the amount of actual damages, including damages**  
37 **for future pecuniary losses, emotional pain, suffering, inconvenience,**  
38 **mental anguish, loss of enjoyment of life, and other nonpecuniary**  
39 **losses, and punitive damages awarded under this section shall not**  
40 **exceed for each complaining party:**

41             **(1) Actual back pay and interest on back pay; and**

42             **(2) (a) In the case of a respondent who has more than five and**  
43 **fewer than one hundred one employees in each of twenty or more**  
44 **calendar weeks in the current or preceding calendar year, fifty**  
45 **thousand dollars;**

46             **(b) In the case of a respondent who has more than one hundred**  
47 **and fewer than two hundred one employees in each of twenty or more**  
48 **calendar weeks in the current or preceding calendar year, one hundred**  
49 **thousand dollars;**

50             **(c) In the case of a respondent who has more than two hundred**  
51 **and fewer than five hundred one employees in each of twenty or more**  
52 **calendar weeks in the current or preceding calendar year, two hundred**  
53 **thousand dollars;**

54             **(d) In the case of a respondent who has more than five hundred**  
55 **employees in each of twenty or more calendar weeks in the current or**  
56 **preceding calendar year, three hundred thousand dollars.**

57         **5. Subsection 4 of this section shall not apply to actions filed for**  
58 **violations of sections 213.040, 213.045, 213.050, and 213.070, to the extent**  
59 **that the alleged violation of section 213.070 relates to or involves a**  
60 **violation of sections 213.040, 213.045, and 213.050, or subsection 3 of**

61 section 213.070 as it relates to housing.

62           **6. In any employment-related civil action brought under this**  
63 **chapter, the plaintiff shall bear the burden of proving that the**  
64 **protected criterion was a motivating factor in the alleged unlawful**  
65 **decision or action.**

66           **7. Notwithstanding subsection 4 of this section, punitive damages**  
67 **shall not be awarded against the state of Missouri or any of its political**  
68 **subdivisions.**

**285.575. 1. This section shall be known and may be cited as the**  
2 **"Whistleblower's Protection Act".**

3           **2. As used in this section, the following terms shall mean:**

4           **(1) "Because" or "because of", as it relates to a decision or action,**  
5 **the person's status as a protected person was the motivating factor;**

6           **(2) "Employer", an entity that has six or more employees for each**  
7 **working day in each of twenty or more calendar weeks in the current**  
8 **or preceding calendar year. "Employer" shall not include the state of**  
9 **Missouri or its political subdivisions, a corporation wholly owned by**  
10 **the state of Missouri, an individual employed by an employer, or**  
11 **corporations and associations owned and operated by religious or**  
12 **sectarian groups;**

13           **(3) "Proper authorities", a governmental or law enforcement**  
14 **agency, or an officer or the employee's human resources representative**  
15 **employed by the employer;**

16           **(4) "Protected person", a person who has reported to the proper**  
17 **authorities an unlawful act of the employer or its agent; a person who**  
18 **reports to an employer serious misconduct of the employer or its agent**  
19 **that violates a clear mandate of public policy as articulated in a**  
20 **constitutional provision, statute, or regulation promulgated under**  
21 **statute; a person who has refused to carry out a directive issued by an**  
22 **employer or its agent that if completed would be a violation of the law;**  
23 **or a person who has engaged in conduct otherwise protected by statute**  
24 **or regulation. A person is not a "protected person" where:**

25           **(a) The person is exempt from overtime compensation under the**  
26 **Fair Labor Standards Act or is a supervisory, managerial, or executive**  
27 **employee or an officer of the employer; and**

28           **(b) The unlawful act or serious misconduct reported concerns**  
29 **matters upon which the person is employed to report or provide**

30 professional opinion.

31           3. This section is intended to codify the existing common law  
32 exceptions to the at-will employment doctrine, and to limit their future  
33 expansion by the courts. This section, in addition to chapter 213 and  
34 chapter 287, shall provide the exclusive remedy for any and all  
35 unlawful employment practices articulated herein and hereby  
36 abrogates any common law causes of action to the contrary.

37           4. It shall be an unlawful employment practice for an employer  
38 to discharge or retaliate against an individual defined as a protected  
39 person in this section, because of that person's status as a protected  
40 person.

41           5. A protected person aggrieved by a violation of this section  
42 shall have a private right of action for actual damages for violations of  
43 this section, but not for punitive damages. However, if a private right  
44 of action for damages exists under another statutory or regulatory  
45 scheme, whether under state or federal law, no private right of action  
46 shall exist under this statute.

47           6. Any party to any action initiated under this section may  
48 demand a trial by jury.

49           7. A protected person aggrieved by a violation of this section  
50 shall have a private right of action which may be filed in a court of  
51 competent jurisdiction. The only remedies available in such an action  
52 shall be:

53           (1) Back pay;

54           (2) Reimbursement of medical bills incurred in treatment of  
55 mental anguish; and

56           (3) If a protected person proves, by clear and convincing  
57 evidence, that the conduct of the employer was outrageous because of  
58 the employer's evil motive or reckless indifference to the rights of  
59 others, then in addition to the amounts referenced in subdivisions (1)  
60 and (2) of this subsection, an additional double amount as liquidated  
61 damages may be awarded. In applying this subdivision, the provisions  
62 of section 510.263 shall be applied as though liquidated damages were  
63 punitive damages and as though the amounts referenced in  
64 subdivisions (1) and (2) of this subsection were compensatory damages.

287.780. 1. No employer [or agent] shall discharge or in any way  
2 discriminate against any employee for exercising any of his rights under this

3 chapter. Any employee who has been discharged or discriminated against shall  
4 have a civil action for damages against his employer.

5 **2. It shall be unlawful:**

6 **(1) For an employer to retaliate or discriminate in any manner**  
7 **against an employee exclusively as a result of the fact the employee**  
8 **refused to violate a statute, regulation, constitutional provision,**  
9 **ordinance, or common law at the request of someone employed by the**  
10 **employer who has direct or indirect supervisory authority over the**  
11 **employee; or**

12 **(2) For an employer to retaliate or discriminate in any manner**  
13 **against an employee exclusively as a result of the fact the employee**  
14 **reported to an authority of the federal, state, or local government a**  
15 **violation by the employer of any statute, regulation, constitutional**  
16 **provision, ordinance, or common law.**

17 **3. This chapter, in addition to chapter 213 and chapter 285, shall**  
18 **provide the exclusive remedy for any and all unlawful employment**  
19 **practices articulated herein and hereby abrogates any common law**  
20 **causes of action not specifically articulated herein.**

21 **4. In any action for damages brought under subsection 1, 2, or 3**  
22 **of this section, the plaintiff shall have the burden of proving the**  
23 **employer's decision or action was motivated exclusively by the**  
24 **employee's exercise of his or her rights under this chapter.**

25 **5. In an action brought under subsection 1 of this section by an**  
26 **employee against an employer or former employer, the sum of the**  
27 **amount of compensatory damages awarded and the amount of punitive**  
28 **damages awarded shall not exceed, for each plaintiff, the following:**

29 **(1) In the case of a defendant who has fewer than one hundred**  
30 **one employees in each of twenty or more calendar weeks in the current**  
31 **or preceding calendar year, fifty thousand dollars;**

32 **(2) In the case of a defendant who has more than one hundred**  
33 **and fewer than two hundred one employees in each of twenty or more**  
34 **calendar weeks in the current or preceding calendar year, one hundred**  
35 **thousand dollars;**

36 **(3) In the case of a defendant who has more than two hundred**  
37 **and fewer than five hundred one employees in each of twenty or more**  
38 **calendar weeks in the current or preceding calendar year, two hundred**  
39 **thousand dollars;**

40           **(4) In the case of a defendant who has more than five hundred**  
41 **employees in each of twenty or more calendar weeks in the current or**  
42 **preceding calendar year, three hundred thousand dollars.**

43           **6. Compensatory damages within the meaning of this section**  
44 **shall not include back pay and interest on back pay.**

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